CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 463

DANIEL REEVES, INC., PETITIONER,

vs.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 18, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,385)

( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No.

DANIEL REEVES, INC., PETITIONER,

vs.

CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX.

	Original	Print
Record from district court of the United States, Southern New York	1	1
Statement of case	1	1
Summons (omitted in printing)	3	
Amended complaint	4	2
Amended answer	9	4
Exhibit "A"—Letter from Bright, deputy commissioner, to Daniel Reeves, Inc	12	6
Exhibit "B"—Claim for abatement of tax assessed	13	7
Exhibit "C"—Letter from deputy commissioner to Daniel Reeves, Inc	16	9
Order for judgment	17	10
Judgment	18	10
Stipulation waiving jury trial	20	11
Stipulation as to facts	21	12
Decision, Mack, J	26	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1930

	Original	Print
Plaintiff's exceptions	30	18
Stipulation and order settling bill of exceptions	31	19
Opinion, Mack, J.	33	19
Petition for appeal and order allowing same	47	30
Citation (omitted in printing)	49	
Assignment of errors	50	31
Stipulation as to record	54	33
Clerk's certificate (omitted in printing)	55	
Proceedings in United States circuit court of appeals, second circuit	56	34
Opinion, Hand, J.	56	34
Judgment	67	40
Clerk's certificate (omitted in printing)	68	
Order allowing certiorari		41

[fols. a-1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

DANIEL REEVES, INC., Plaintiff-Appellant,
against
CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue for the Third District of New York, Defendant-Appellee

STATEMENT OF CASE

This action was commenced in the United States District Court for the Southern District of New York, by the issuance of a summons on the 22nd day of November, 1927, and the service thereof with a verified complaint upon the defendant on the 25th day of November, 1927.

Defendant duly interposed his answer and subsequently plaintiff served an amended complaint upon the attorney for the defendant on the 26th day of June, 1928. Issue was joined by the service of the amended answer on the 12th day of April, 1929.

This action came on for trial before Hon. Julian W. Mack. Jury was waived pursuant to Section 649 of the United States Revised Statutes, by stipulation dated January 16th, [fol. 2] 1930, wherein it was further agreed that the Court make special findings of fact and conclusions of law. Judgment was rendered in favor of the defendant dismissing the complaint on the merits and for costs in the sum of $30.00. Judgment was entered and filed on the 6th day of March, 1930. This appeal was allowed by order of Judge Bondy on the 28th day of March, 1930.

The plaintiff appears by Herman Goldman, its attorney, whose offices are maintained at 120 Broadway, New York City, New York, and the defendant appears by United States Attorney, Charles H. Tuttle, who has his offices in the Post Office Building, in the Borough of Manhattan, City of New York.

There has been no change of parties or attorneys.

[fol. 3] Summons, in usual form, omitted in printing.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED COMPLAINT

The plaintiff, above named, by Herman Goldman, its attorney, complaining of the defendant, alleges:

First. The plaintiff is, and at all the times hereinafter alleged was, a corporation organized under the laws of the State of New York, and having its principle place of business in New York, New York.

Second. That during the period between about March 11th, 1920, and about August 15th, 1921, William H. Edwards was the duly appointed and qualified Collector of Internal Revenue of the United States of America for the Second District of New York.

Third. That from and after April 1st, 1923, the defendant was and now is the duly appointed and qualified Collector of [fol. 5] Internal Revenue of the United States of America for the Third District of New York.

Fourth. On or about March 11th, 1920, plaintiff duly filed with said William H. Edwards, then Collector of Internal Revenue for the Second District of New York, its income and profits tax report for the year ended December 31st, 1919, in accordance with the Revenue Acts of the United States then in effect, and during the period between about March 15th, 1920, and December 15th, 1920, paid to the said Collector of Internal Revenue various sums of money aggregating $80,479.75 which plaintiff believed to be the entire amount for which it was liable for income and profits tax for the year ended December 31st, 1919.

Fifth. On or about the 5th day of April, 1924, plaintiff received from the defendant, as Collector of Internal Revenue as aforesaid, a bill and demand for payment of an additional assessment of $1,886.79 claimed to be due from plaintiff for said income and profits taxes for the year 1919.

Sixth. Thereafter and on or about the 14th day of November, 1925, the defendant illegally and erroneously collected from plaintiff the sum of $2,061.31, claimed by defendant to

be due from plaintiff to the defendant as additional income and profits tax for the year ended December 31st, 1919; which said sum was paid under protest and involuntarily and under duress to avoid, and in fear of, the penalties and the lien and the processes of warrant for distraint prescribed by the laws of the United States, in the case of failure to pay said sum made and provided.

[fol. 6] Seventh. On information and belief, that by the laws of the United States in such case made and provided and the Internal Revenue acts, the defendant was prohibited from taking any proceeding for the collection of said additional assessment on November 14, 1925, which date was more than five years after the filing of plaintiff's report of income and profits tax for the year ended December 31st, 1919.

Eighth. That no proceedings for the collection of said additional assessment and said sum of money against plaintiff were had or taken between March 11th, 1920, the date when plaintiff filed its report of income and profits tax for the year 1919 and November 14th, 1925, or within five years from the date of filing of plaintiff's aforesaid report of income and profits tax for the year 1919.

Ninth. On information and belief, that the collection by the defendant of said additional assessment was wrongful and unlawful and in violation of plaintiff's rights and a trespass on plaintiff's property.

Tenth. That on or about the 27th day of April, 1927, plaintiff duly applied in writing to the Commissioner of Internal Revenue of the Treasury Department of the United States for the refund of said additional amount by filing with the defendant on said date a claim for refund on the grounds that said additional assessment was illegally and wrongfully collected in that the proceedings for the collection thereof were not had and taken within the period between March 11th, 1920, the date the report of income [fol. 7] and profits tax of the plaintiff was filed for the year 1919, and November 14th, 1925, the date the tax was collected by the defendant or within five years after the filing by plaintiff of its income and profits tax report for the year ended December 31st, 1919.

Eleventh: On or about the 7th of November, 1927, plaintiff received from the Commissioner of Internal Revenue of the Treasury Department of the United States notice dated November 5th, 1927, that its claim for refund of said additional assessment and said sum of $2,061.31 was rejected, and neither said amount so collected nor any part thereof has been repaid to the plaintiff, and the defendant refuses to pay same to the plaintiff.

Twelfth. That by reason of the premises the defendant became and is indebted in the sum of $2,061.31 to the plaintiff.

Wherefore plaintiff demands judgment against defendant for said sum of $2,061.31, with interest thereon from November 14th, 1925, with the costs of this action.

Herman Goldman, Attorney for Plaintiff, 120 Broadway, New York City.

[fol. 8] *Duly sworn to by James J. Curran. Jurat omitted in printing.*

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER

The defendant, above named, by his attorney, Charles H. Tuttle, United States Attorney for the Southern District of New York, for his amended answer to the amended complaint herein respectfully shows and alleges:

First. Admits the allegations contained in paragraphs "First", "Second", "Third", and "Fourth" of the complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegation "which plaintiff believed to be the entire amount for which it was liable for income and profits tax for the year ended December 31st, 1919", contained in paragraph "Fourth".

Second. Admits the allegations contained in paragraph "Fifth" of the complaint.

Third. Denies the allegations contained in paragraphs "Sixth", "Seventh", "Eighth", and "Ninth" of the com-

[fol. 10] plaint, except admits, with respect to paragraph "Eighth", that the only proceeding for collection between the dates alleged by plaintiff was the sending of a notice and demand for payment of the additional assessment in the sum of $1,886.79 for the year 1919.

Fourth. Admits the allegations contained in paragraphs "Tenth" and "Eleventh" of the complaint.

Fifth. Denies the allegations contained in paragraph "Twelfth" of the complaint.

As and for a separate, complete, and Affirmative Defense to Plaintiff's Alleged Cause of Action Herein:

Sixth. On or about January 25, 1924, there was written to the plaintiff from the office of the Commissioner of Internal Revenue a letter, a copy of which is annexed hereto as Exhibit A and made a part hereof.

Seventh. That the additional assessment in the sum of $1,886.79 alleged in paragraph "Fifth" of the complaint was made in March, 1924, within four years from the date upon which plaintiff in paragraph "Fourth" of the complaint alleges that its return was filed, to wit, on or about March 11, 1920.

Eighth. Thereafter on or about April 16, 1924, the plaintiff filed a claim for abatement in the sum of $1,886.79, a copy of which is annexed hereto as Exhibit B and made a part hereof.

[fol. 11] Ninth. Thereafter, subsequent to the filing of plaintiff's said claim for abatement, no action or proceeding to collect the said additional assessment of $1,886.79 was taken, but careful consideration was given to the plaintiff's claim that it be assessed for the year 1919 in accordance with Sections 327 and 328 of the Revenue Act of 1918, and proceedings for collection were held in abeyance, administrative action for collection was withheld and delayed, and collection of said additional assessment of $1,886.79 was thereby stayed.

Tenth. Thereafter, on or about September 28, 1925, after consideration of briefs filed and arguments made on behalf of plaintiff, there was written to the plaintiff from the office of the Commissioner of Internal Revenue a letter,

a copy of which is annexed hereto as Exhibit C and made a part hereof.

Eleventh. That by virtue of the premises and of Sections 607 and 611 of the Revenue Act of 1928 the collection of the sum of $2,061.31 by the defendant from the plaintiff on or about the 14th day of November, 1925, was legal, proper, and timely made after the rejection of plaintiff's claim for abatement by the Commissioner of Internal Revenue and no refund is now due the plaintiff nor can the sum of $2,061.31, which plaintiff seeks to recover, be legally recovered in this action.

Wherefore the defendant demands judgment against the plaintiff dismissing this complaint together with the costs and disbursements of this action.

Charles H. Tuttle, United States Attorney, Southern District of New York, Attorney for Defendant.

[fol. 12] EXHIBIT A TO AMENDED ANSWER

IT:CA:T. 2205-10

Daniel Reeves, Inc., 451 West 125th Street, New York, New York.

SIRS: An examination of your income tax returns and of your books of account for the years 1918 and 1919, together with the information heretofore submitted has been made, and the results thereof are outlined in the attached statement.

In view of the fact that you have filed with this office a request for relief under the provisions of Section 327 and 328, Revenue Act of 1918, and the further fact that any overassessments found due by reason of the application of the above provisions may be jeopardized by the tolling of the Statute of Limitations unless a formal claim is filed, it is deemed expedient by this office that the above tax be assessed immediately without giving the usual thirty-day notice as provided for in Section 250 (d) of the Revenue Act of 1921, and that a claim be filed by you to protect your interests in the matter.

The Bureau will, therefore, entertain a claim for abatement if filed within ten days of receipt of notice and demand from the Collector of Internal Revenue for your district, in accordance with the provisions of Article 1006 of Regulations 62.

An appeal covering the basis of the claim should be filed, [fol. 13] setting forth in full all information upon which you base your protest against the above assessment, and any additional facts in support of your claim for the application of the relief provision of the Revenue Act of 1918. This appeal should be filed in triplicate, and should be addressed to the Commissioner of Internal Revenue for the specific attention of IT:CA:T-2205-10.

On request, a conference will be arranged prior to a final decision.

If an appeal is not filed, payment should be made upon receipt of notice and demand from the Collector of Internal Revenue for your district.

Respectfully, J. G. Bright, Deputy Commissioner,
(Signed) by F. R. Clutes, Head of Division.

DLS-2.

EXHIBIT B TO AMENDED ANSWER

Claim for

XAbatement of tax assessed

Credit against outstanding assessments

Refund of taxes illegally collected

Refund of amounts paid for stamps used in error or excess

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

[fol. 14] STATE OF NEW YORK,
County of New York, ss:

(Name of taxpayer or purchaser of stamps:) Daniel Reeves, Inc., (Residence—give street and number as well as city or town and State:) 44 West 143d Street, (Business address:) New York, N. Y.

This deponent, being duly sworn according to law, deposes and say that this statement is made on behalf of the

taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period: Year 1919.

1. Business in which engaged: ——.

2. Character of assessment or tax (State for or upon what the tax was assessed or the stamps affixed:) Corporation income and profits tax.

3. Amount of assessment or stamps purchased: ——.

4. Reduction of Tax Liability requested (Income and Profits Tax): $1,886.79.

5. Amount to be abated: $1,886.79.

6. Amount to be refunded (or such greater amount as is legally refundable): ——.

7. Dates of payment (see Colector's receipts or indorsements of canceled checks): ——. (If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: ——.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: ——.

11. Unpaid assessment against which credit is asked, period from —— to ——: ——.

[fol. 15] Deponent verily believes that this application should be allowed for the following reasons:

The taxpayer has received a notice and demand for additional tax in the sum of $1886.79, for the calendar year ended December 31st, 1919. The assessment is marked NC-250D. The taxpayer was not granted the benefits of Treasury Decision #3492 in regard to filing appeals, and therefore, it is respectfully requested that the additional tax of $1,886.79 be abated pending the determination of the correct tax liability of this taxpayer for the year 1919, based upon adjustments to be made to the tax liability for the year 1918 and also the company's application and claim for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918 for the taxable year ended December 31st, 1919.

(Attach additional sheets if necessary.)

(Signed) Daniel Reeves, Inc., by James J. Curran, Secretary.

Sworn to and subscribed before me this 11th day of April, 1924. John S. Quinn, Notary Public, Kings County. Clerk's No. 14. Register's No. 5006. Certificate filed in New York County. Clerk's No. 25. Register's No. 5107. Queens Co. Registry No. 184. Commission expires March 30, 1925.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

[fol. 16] EXHIBIT C TO AMENDED ANSWER

IT:E:SM-1. SR-B-4050.

Daniel Reeves, Incorporated, 451 West 125th Street, New York, New York.

SIRS: Reference is made to your protest dated March 20, 1925, against the result of the allowance of your application for assessment of your profits tax for the calendar year 1919 under the provisions of Section 328 of the Revenue Act of 1918, as set forth in Bureau letter dated February 24, 1925.

After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised the Bureau holds that denial of your application under the provisions of Section 328 of the Revenue Act of 1918 is sustained by comparison of your corporation with representative concerns, as nearly as may be similarly circumstanced, as contemplated under the provisions of Section 328 of the statute. Such comparison discloses that no hardship or inequality was suffered by your corporation in the matter of taxes assessed. Accordingly, the conclusions set forth in the above-mentioned letter are sustained.

Your case is, therefore, deemed closed.

A copy of this communication has been forwarded to your authorized representative, Mr. Arthur Rothstein, 120 Broadway, New York, New York.

Respectfully, ——— ———, Deputy Commissioner.

md-1.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR JUDGMENT—Jan. 16, 1930

The issues in this action having come on for trial and said issues having been tried before the Court without the intervention of a jury, pursuant to written stipulation filed with the Clerk of this Court pursuant to the provisions of Section 649 of the United States Revised Statutes, and the Court having duly made its decision in writing

Now on motion of Charles H. Tuttle, United States Attorney, appearing as attorney for the defendant, it is hereby

[fol. 18] Ordered that the defendant, Charles W. Anderson, individually and as Collector of Internal Revenue for the Third District of New Cork, have and recover judgment against the plaintiff, Daniel Reeves, Inc., dismissing the complaint herein upon the merits; and it is further

Ordered that the Clerk of the Court be and he is hereby directed to make and enter such judgment accordingly, together with the costs and disbursements of this action.

Julian W. Mack, Circuit Judge.

IN UNITED STATES DISTRICT COURT

DANIEL REEVES, INC., Plaintiff,

against

CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue for the Third District of New York, Defendant

JUDGMENT

The above entitled action having been brought on to trial at the Woolworth Building, Borough of Manhattan, City [fol. 19] of New York, before the Hon. Julian W. Mack, a jury having been duly waived by stipulation in writing pur-

suant to Section 649 of the United States Revised Statutes, and the parties having entered into and submitted a stipulation in writing, setting forth all of the facts upon which the respective parties relied in support of their respective positions, and the plaintiff having heretofore made a motion for judgment on the pleadings herein and on said motion, the Court having on November 13, 1929 delivered an opinion upon questions of law identical with those raised upon the trial, and the Court having made special findings of fact and conclusions of law which were filed with the Clerk of the Court on the 21st day of January, 1930, and having incorporated its said opinion of November 13, 1929 in its decision which directed that the defendant have judgment against the plaintiff dismissing the complaint on the merits, which was filed with the Clerk of the Court the 21st day of January, 1930, and an order of the Court directing that a judgment be entered in favor of defendant and against plaintiff dismissing the complaint on the merits, having been filed on January 21, 1930, it is hereby

Ordered, Adjudged and Decreed that the defendant have judgment against the plaintiff dismissing the complaint on the merits, together with costs as taxed in the sum of $30.00.

Judgment signed and filed this 6th day of March, 1930.

(Signed) Alex Gilchrist, Jr., Clerk.

[fol. 20] In United States District Court

[Title omitted]

Stipulation Waiving Jury Trial

It is hereby stipulated and consented by and between the parties hereto acting by and through their respective attorneys that this action may be tried by the Court without intervention of a jury, a jury being hereby waived, pursuant to Section 649 of the United States Revised Statutes.

The parties shall join in requesting the Court in determining the controversy to make a decision in which the Findings of Fact shall be special and which the Court shall make its separate conclusions of law. This Court shall be

requested to pass upon any proposed Conclusions of Law submitted by either party.

Dated New York, January 16, 1930.

Herman Goldman, Attorney for Plaintiff. Charles H. Tuttle, Attorney for Defendant.

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO FACTS

It is hereby stipulated, conceded and agreed by and between the respective parties hereto, acting by and through their respective attorneys, that for the purposes of the trial of this action only the following are the facts:

First. The plaintiff was and at all the times from January 1, 1919, to and including October 26, 1928, a corporation duly organized under the laws of the State of New York, having its principal place of business in the City of New York, State of New York.

Second. During the period between about March 11, 1920, and about August 15, 1921, one William H. Edwards was duly appointed and qualified as Collector of Internal Revenue of the United States of America for the Third District of New York.

Third. From and after April 1, 1923, and up to and in-
[fol. 22] cluding the date of this action, the defendant was the duly appointed and qualified Collector of Internal Revenue of the United States of America for the Second District of New York.

Fourth. On or about March 11, 1920, plaintiff duly filed with said William H. Edwards, then Collector of Internal Revenue of the United States of America, for the Second District, its income and profits tax report for the year ended December 31, 1919, in accordance with the Revenue Acts of the United States then in effect, and during the period between about March 15, 1920, and December 15, 1920, paid to the said William H. Edwards, as such Col-

lector, various sums of money aggregating $80,479.75, which the plaintiff in good faith believed to be the entire amount for which it was liable to the United States of America, or any of its departments or offices for income and profits tax for the year ended December 31, 1919.

Fifth. On or about April 5, 1924, plaintiff received from the defendant as Collector of Internal Revenue as aforesaid a bill and demand for payment of an additional assessment of $1,886.79, claimed by the defendant to be due from the plaintiff as an additional income and excise profits tax for the year 1919.

Sixth. Thereafter and at or about November 14, 1925, the defendant collected from the plaintiff the sum of $2,061.31 claimed by the defendant to be due from the plaintiff to the defendant as additional income and profits tax for the year ended December 31, 1929.

Seventh. The plaintiff paid to the defendant the sum so collected under protest and involuntarily and under duress.

[fol. 23] Eighth. No proceedings for the collection of said additional assessment and said sum of money were had or taken against the plaintiff between March 11, 1920, and November 14, 1925, nor within five years from the date of filing of plaintiff's aforesaid report of income and profits tax for the year 1919.

Ninth. On or about April 27, 1927, plaintiff duly applied in writing to the Commissioner of Internal Revenue of the Treasury Department of the United States for the refund of said additional amount by filing with the defendant on said date a claim for refund on the ground that said additional assessment was illegal and wrongfully collected in that proceedings for the collection thereof were not had or taken within the period between March 11, 1920, the date when the report of income and profits tax of the plaintiff was filed for 1919, and November 14, 1925, the date the aforesaid additional amount was collected by the defendant, or within five years after the filing by the plaintiff of its income and profits tax return for the year ended December 31, 1919.

Tenth. On or about November 7, 1927, plaintiff received from the Commissioner of Internal Revenue of the Treas-

ury Department of the United States notice, dated November 5, 1927, that its claim for refund for said additional amount and said sum of $2,061.31 was rejected, and neither said amount so collected, nor any part thereof has been repaid to the plaintiff and the defendant refuses to pay the same to the plaintiff.

Eleventh. Plaintiff filed its aforesaid report of its income and profits tax for the year ended December 31, 1919, [fol. 24] in entire good faith and there was no fraud or element of fraud in connection therewith.

Twelfth. On or about January 25, 1924, there was written to the plaintiff from the office of the Commissioner of Internal Revenue a letter, a copy of which is annexed to the answer as Exhibit A and made a part thereof.

Thirteenth. The additional assessment in the sum of $1,886.79 was made in the month of March, 1924.

Fourteenth. On or about April 16, 1924, plaintiff filed a claim for abatement in the sum of $1,886.79, a copy of which is annexed to the answer as Exhibit B and made a part thereof.

Fifteenth. Subsequent to the filing of the said claim for abatement no action or proceeding to collect said additional sum of $1,886.79 was taken and proceedings for the collection thereof were held in abeyance and administrative action for collection was withheld and delayed.

Sixteenth. On or about September 28, 1925, after the submission of briefs and oral argument in support of said claim for abatement there was written to the plaintiff from the office of the Commissioner of Internal Revenue a letter, a copy of which is annexed to the answer and marked Exhibit C and made a part thereof.

Seventeenth. The plaintiff did not file any bond in connection with the aforesaid claim in abatement.

Eighteenth. The plaintiff did not enter into any agreement or stipulation pursuant to which the collection of the [fol. 25] aforesaid additional amount or assessment was delayed or postponed.

Nineteenth. The plaintiff did not enter into any agreement, stipulation or paper writing extending or waiving the period of limitations within which the aforesaid additional amount or additional assessment might be collected from it.

Twentieth. No agreement, stipulation or waiver between the plaintiff and any representative of the Government of the United States require the holding in abeyance of proceedings for collection, or the withholding and delaying of administrative action for the collection of said additional assessment nor was such holding in abeyance, withholding and delay required by the terms of any injunction, order, decree or mandate issued by any court.

It is hereby further stipulated that upon the foregoing facts this action may be tried by this Court without a jury, a jury being hereby waived, pursuant to the provisions of Section 649 of the United States Revised Statutes.

The parties shall join in requesting the Court in determining the controversy to make a decision in which the facts hereinbefore stipulated shall be incorporated as the Court's Findings of Fact and in which the Conclusions of Law upon which the decision is based may be specified, and to pass upon any proposed Conclusions of Law submitted by either party.

Dated New York, January 16th, 1930.

Herman Goldman, Attorney for Plaintiff. Charles H. Tuttle, Attorney for Defendant.

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECISION

The above entitled action having been brought on to trial at the Woolworth Building, Borough of Manhattan, City of New York, before me, a jury having been duly waived by stipulation in writing pursuant to Section 649 of the United States Revised Statutes, and the parties having entered into and submitted a stipulation in writing, setting forth all of the facts upon which the respective parties relied in

support of their respective positions, and the plaintiff having heretofore made a motion for judgment on the pleadings herein and on said motion, the Court having delivered an opinion upon questions of law identical with those raised upon the trial, I do hereby find as follows, incorporating said opinion in this decision:

Findings of Fact

I do hereby find as facts each and every fact set forth in said stipulation which is dated January 16, 1930, and do [fol. 27] hereby incorporate herein as found the said stipulation with the same force and effect as if the facts therein set forth were here repeated.

Conclusions of Law

First. The laws of the United States in force and effect on November 14, 1925, prohibited the defendant from collecting from the plaintiff the sum of $2,061.31, or any part thereof on said date.

Second. The collection by the defendant of the said sum of $2,061.31 on November 14, 1925, constituted an illegal collection.

Third. On November 14, 1925, and immediately thereafter the plaintiff had a good and substantial cause of action against the defendant for the recovery of the sum of $2,061.31 with interest thereon from November 14, 1925.

Fourth. The complaint herein states facts sufficient to constitute a cause of action against the defendant for the relief demanded in the complaint and the facts contained in the stipulation and hereinbefore found adequately support the allegations in the complaint.

Fifth. The delay of the defendant in the collection of the aforesaid additional assessment or sum after the filing by the plaintiff of its claim in abatement constituted a stay of said collection.

Sixth. By reason of the enactment of Sections 607 and 611 of the Revenue Act of 1928 and by reason of the filing [fol. 28] by the plaintiff of its claim for abatement and by virtue of the delay by the defendant in making collection of

said tax after the filing of said claim for abatement the plaintiff is precluded from recovering the amount collected by the defendant from the plaintiff on November 14, 1925, or any part thereof, or interest thereon, and the aforesaid facts enumerated in this conclusion constitute a defense and bar to the cause of action set forth in the complaint.

Seventh. Said Section 611 of the Revenue Act of 1928 is constitutional and the effect herein given to it as a defense and bar against the cause of action alleged in the complaint does not result in a deprivation of plaintiff of its property without due process of law in contravention of the provisions of the Fifth Amendment of the Constitution of the United States.

Eighth. Section 611 of the Revenue Act of 1928 is constitutional and does not constitute a delegation to the several Collectors of Internal Revenue of the legislative power conferred upon Congress by Section 8 of Article 1 of the Constitution of the United States to lay and collect taxes, duties, imposts and excises.

Ninth. Section 611 of the Revenue Act of 1928 constitutes a ratification by the Congress of the collection by the defendant from the plaintiff of the said additional sum or assessment made on November 14, 1925.

Tenth. The provisions of the several Revenue Acts adopted by the Congress prior to the year 1926, which pro- [fol. 29] vide the periods after the filing of reports of income and profits taxes within which collections thereof or on account thereof might be made, were statutes of repose only and resulted only in the bar of the right of the collector to make collections of taxes after the expiration of said periol but did not extinguish the liability of the taxpayers to pay the tax.

Eleventh. Section 1106 (a) of the Revenue Act of 1926 by reason of the repeal thereof as of the date of its enactment by Section 612 of the Revenue Act of 1928 did not operate to extinguish the liability of the plaintiff to pay said additional sum or assessment which was collected on November 14, 1925.

Twelfth. The affirmative defense alleged in the answer herein states facts sufficient to constitute a good and complete defense to the cause of action alleged in the complaint and the facts contained in the stipulation and hereinbefore found adequately support the allegations in the said affirmative defense.

Thirteenth. The defendant is entitled to judgment dismissing the complaint on the merits. I direct judgment accordingly.

Dated January 16, 1930.

Julian W. Mack.

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S EXCEPTIONS

The plaintiff above named hereby excepts to the decision herein by Hon. Julian W. Mack, Circuit Judge, made herein on or about January 16, 1930, and filed on or about said date in the office of the Clerk of this Court in the following particulars:

To the conclusions of law contained in said decision and numbered "Fifth", "Sixth", "Seventh", "Eighth", "Ninth", "Tenth", "Eleventh", "Twelfth" and "Thirteenth" and each and every part of said conclusions.

Dated New York, January 16, 1930.

Yours, etc., Herman Goldman, Attorney for Plaintiff. Office & P. O. address: 120 Broadway, Borough of Manhattan, City of New York.

[fol. 31] To Charles H. Tuttle, United States Attorney, Attorney for Defendant, United States Post Office and Court Building, Borough of Manhattan, City of New York; Clerk of the District Court of the United States for the Southern District of New York.

In United States District Court

[Title omitted]

Stipulation and Order Settling Bill of Exceptions

It is hereby stipulated and agreed that the foregoing contains all the testimony and exceptions made at the trial of [fol. 32] this case, and that the same may be settled and ordered on file as the bill of exceptions herein.

Herman Goldman, Attorney for Plaintiff. Charles H. Tuttle, United States Attorney, Attorney for Defendant.

Upon the foregoing stipulation, it is

Ordered that the foregoing may be settled and ordered on file as the bill of exceptions herein.

Dated New York, April 3rd, 1930.

Julian W. Mack, U. S. C. J.

[fol. 33] In United States District Court

Opinion

At Law. Actions by Regla Coal Company, by Philip S. Arthur, by the Homer Brooke Glass Company, and by Robins Conveying Belt Company against Frank K. Bowers, and by Daniel Reeves, Inc., against Charles W. Anderson. Judgment in accordance with opinion.

Herman Goldman, of New York City (Elkan Turk and Arthur Rothstein, both of New York City, of counsel), for plaintiffs.

Charles H. Tuttle, U. S. Atty., of New York City (Walter H. Schulman, of New York City, of counsel), for defendants.

Mack, Circuit Judge:

Motions for judgment on the pleadings in five cases. The facts as alleged in the complaint and admitted in the answer

in the Regla Company Case raise the identical legal questions involved in each of the other cases.[1]

In the Regla Case plaintiff, on May 1, 1918, filed its income and excess profits tax return for the fiscal year ending June 30, 1917, and was duly assessed and paid the sum of $6,867.94 as taxes for that year. On April 18, 1923, it received a bill for an additional assessment of $16,679.80; it appealed to the Special Assessment Section of the Income Tax Unit at Washington, and as part of the appeal, on April 26, 1923, filed a claim for the abatement of these taxes. [fol. 34] No further proceedings to collect the taxes were taken until May 28, 1924, when defendant collected $7,194.44 additional taxes. Three years later, on April 27, 1927, plaintiff's application for a refund was refused (except as to a sum of $220.40 refunded as an over-assessment). As defendant took no further action within the statutory period of six months (26 U. S. C. § 156 [26 U. S. C. A. § 156], plaintiff brought the present suit on January 17, 1928, to recover the balance of $6,974.04. The pertinent statutes are set forth in the margin.[2]

---

[1] There are certain minor, immaterial differences: In the Arthur Daniel Reeves, Inc., and Robins Conveying Company Cases, plaintiffs received letters from the Commissioner stating that an immediate assessment would be made, but that the Income Tax Bureau would entertain a claim in abatement if filed within a specified time; (b) in the Arthur Case, a part of the claim for abatement was allowed; (c) in the Brooke Glass Company and Daniel Reeves, Inc., Cases, the Commissioner definitely refused the application for a refund instead of merely taking no action thereon within the statutory six months prior to suit. 26 U. S. C. § 156 (26 U. S. C. A. § 156).

[2] Revenue Act of 1918:

"Sec. 250. * * * (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was

Plaintiff contends that: (1) The collection of May 28, 1924, was wholly illegal under the statutes then in force because made more than 5 years after the date of the original return; (2) they have a common-law right to recover the money thus collected; (3) recovery is not barred because of Sections 607 and 611 of the Revenue Act of 1928 (26 U. S. C. A. §§ 2607, 2611), since that act is inapplicable be- [fol. 35] cause (a) a formal stay of collection is necessary under Section 611 and (b) the act created merely a new status of overpayor and was not intended to destroy the right to recover taxes illegally collected; (4) if Sections 607 and 611 of the Act of 1928 (26 U. S. C. A. §§2607, 2611) are to be construed as destroying this right, they are unconstitutional as constituting a deprivation of property without due process of law and as an improper delegation of the federal taxing power to the collector.

Defendant contends that (1) as a measure of curative expediency, Congress has the constitutional power, without depriving a taxpayer of his property without due process of law, to remove the bar of a statute of limitation on tax collection, which, as an act of grace, it had previously enacted for the repose of the taxpayer; (2) the intent of

---

made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due." 40 Stat. 1083.

Revenue Act of 1926:

"Sec. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax." 44 Stat. 113, 26 U. S. C. § 1249 note (26 U. S. C. A. § 1249 note).

Congress in passing Sections 607 and 611 was to remove the bar of the existent statute of limitations as a defense or [fol. 36] as a cause of action, and to legalize collections made more than five years after the filing of returns in all cases where consideration of claims for abatement of duly assessed taxes delayed collection until after the five-year period of limitation on collection had expired.

[1] Under Section 250(d) of the Revenue Act of 1921 (42 Stat. 265) it is clear that the collection of the $16,679.80 was barred on May 1, 1923, five years after the date of the original return, and that on May 28, 1924, when this sum was actually collected from plaintiff, defendant was without authority to enforce collection either by distraint or suit. Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676. Accordingly, plaintiff is entitled to judgment unless Sections 607 and

---

Revenue Act of 1928:

"Sec. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." 45 Stat. 874, 26 U. S. C. § 2607 (26 U. S. C. A. § 2607).

"Sec. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection." 45 Stat. 875, 26 U. S. C. 2611 (26 U. S. C. A. § 2611).

"Sec. 612. Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926." 45 Stat. 875.

611 of the Revenue Act of 1928 (26 U. S. C. A. §§ 2607, 2611) may be construed as barring such collection, and, further, unless those sections, so construed, are constitutional.

2. In my judgment, Section 611 of the Act of 1928 is applicable to the cases at bar. In all of them the assessments in question were made prior to June 2, 1924; claims for abatement were filed by the taxpayer (in three of them at the invitation of the Commissioner); and pending decisions on such claims, the collector made no attempt whatever to collect the taxes within the time remaining before the statutory bar would fall. But plaintiff, in reliance on the case of United States v. Burden, Smith & Co., 33 F. (2d) 229, 230 (C. C. A. 5th), followed in Cutcheon v. Rafferty (D. C. E. D. N. Y.), 34 F. (2d) 708, decided July 15, [fol. 37] 1929, and Pepsin Syrup Co. v. Schwaner (D. C. S. D. Ill.), 35 F. (2d) 197, decided July 20, 1929, contends that the words "and if the collection * * * was stayed," in Section 611 (26 U. S. C. A. § 2611) require some form of compulsory stay binding upon the collector. In the Burden, Smith & Co. Case the Court decided that "stayed", in a legal sense, is not interchangeable with "delayed", and necessarily connotes "some act on the part of the taxpayer which would morally or legally tie the hands of the Commissioner and prevent collection of the tax"; and since Article 1032 of Regulation 62 of the Income Tax Bureau specifically provides that the filing of a claim for abatement did not of itself operate as a suspension of collection, the Court held that some kind of formal stay is necessary within Section 611 of the Act of 1928 (26 U. S. C. A. § 2611).

[2-4] With all due respect, I have been unable to concur in this conclusion, and, in this district, am not bound to accept it. While taxing statutes are to be interpreted liberally in favor of the taxpayer, particular revenue acts which complement existing statutes must be interpreted with reference to such earlier acts and in the light of conditions resulting from their interpretation and administration. Section 611 of the Act of 1928 (26 U. S. C. A. § 2611) cannot be construed to contemplate a judicial stay of collection, for it has long been settled that such an injunction will not issue (Rev. St. § 3224, 26 U. S. C. § 154 [26 U. S. C. A. § 154] even against collections after the statutory period.

Ellay Co. v. Bowers, 25 F. (2d) 637 (C. C. A. 2d). Plaintiff contends, however, that a compulsory stay binding on the Bureau and the collector, similar to that formerly pro-
[fol. 38] vided in Section 279 of the Revenue Act of 1924 (43 Stat. 300, see 26 U. S. C. A. § 1063, historical note), must have been intended. But as pointed out by Judge Dawson in Wright & Taylor, Inc. v. Lucas (D. C. W. D. Ky.), 34 F. (2d) 328, 332, decided July 26, 1929, Section 611 (26 U. S. C. A. § 2611), by its express terms, deals with taxes assessed prior to June 2, 1924, which was the effective date of the Revenue Act of 1924. Accordingly, it seems necessary to examine the provisions of statutes enacted prior to that date relating to claims for the abatement of taxes. The only act making provision for such claims is that of 1918, in which paragraph 14 of Section 234 (40 Stat. 1079) authorizes a taxpayer at the time of filing his return to file a claim in abatement, provides that payment should not be required until such claim is passed upon; but the taxpayer must file a proper bond. This section was thus the only provision in any of the prior revenue acts which fell within the specific terms of Section 611 of the Act of 1928 (26 U. S. C. A. § 2611).

The 1918 act, however, required that a claim for abatement be accompanied by a bond; Section 611 of the Act of 1928, by its express terms, is applicable, irrespective of whether or not a bond accompanied the claim. Moreover, while the Act of 1918 was the only statute prior to 1924 which made provision for a claim and formal stay, the Commissioner of Internal Revenue has had authority to abate or refund taxes illegally assessed throughout the period under review. See 26 U. S. C. A. § 149, historical note. And pursuant to statutory authority, the Commissioner, with the approval of the Secretary of the Treasury, [fol. 39] promulgated regulations which included provisions for the filing of claims in abatement. In none of them, however, was the execution of a bond required, or was there a mandatory provision that collection must be stayed pending decision on the claim in abatement. On the contrary, it was provided that the filing of a claim in abatement did not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax

being jeopardized by the running of the statute or otherwise. See Article 261, Regulation 33; Article 1032, Regulation 45; Article 1032, Regulation 62; cf. United States v. Burden, Smith & Co. (C. C. A.), 33 F. (2d) 229, 230. Under these regulations, the collector had authority to postpone the collection of the tax pending the determination of the claim for abatement, unless, in his judgment, such action would jeopardize the ultimate collection of the tax. Postponement was the common practice where there was no doubt as to the solvency of the taxpayer; in many cases the period of the statutory bar on collection expired before the decision on the claim in abatement had been rendered. See H. R. Rep. No. 2, 70th Cong. 1st Sess., page 34; H. R. Doc. No. 578, 69th Cong., 2d Sess., page 3, et seq. This was because prior to Bowers v. New York & Albany Lighterage Co., 273 U. S. 346; 47 S. Ct. 389; 71 L. Ed. 676, the Bureau believed that the limitation provisions did not apply to distraints, and that therefore the collection was not in fact jeopardized.

Following the decision in the Albany Lighterage Case, a large number of taxpayers in the situation of the present [fol. 40] plaintiffs, who had failed to have their assessments abated and who had been forced to pay under threat of distraint, sought to secure refunds on the ground that the taxes had been illegally collected. It was to meet this situation that the present Section 611 (26 U. S. C. A. § 2611) was drafted; its purpose is clearly set forth in the report of the Ways and Means Committee in presenting the bill to the House:

"Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which

the period for assessment expired prior to the enactment of the 1924 Act, that the period of collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.

"Your committee appreciates the fact that this provi- [fol. 41] sion will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax l-ability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment." H. R. Rep. No. 2, 70th Cong., 1st Sess., page 34; see also Sen. Rep. No. 960, 70 Cong., 1st Sess., page 42.

That Section 611 (26 U. S. C. A. §2611) was intended to include more than those cases in which a formal claim in abatement and bond had been filed is further indicated in the light of the inapplicability of the time limitation to the liability on the bond. See United States v. John Barth Co., 279 U. S. 370, 376; 49 S. Ct. 366; 73 L. Ed. 743.

In view of the prior legislation, the departmental regulations and practice thereunder, and the statements in the Committee reports, I am entirely clear that Section 611 should be construed as applicable to those cases in which the filing of a claim in abatement had in fact resulted in an administrative delay in collecting duly assessed taxes, even though no formal "stay" had been granted.

[5, 6] 3. I come then to a consideration of the constitutionality of Section 611 as applied to the cases at bar. It is well settled that Congress has the power to ratify, by sub-

[fol. 42] sequent legislation, an unauthorized and illegal tax collection so as to give it retroactive validity. United States v. Heinszen & Co., 206 U. S. 370; 27 S. Ct. 742; 51 L. Ed. 1098; 11 Ann. Cas. 688; Rafferty v. Smith, Bell & Co., 257 U. S. 226; 42 S. Ct. 71; 66 L. Ed. 208. But plaintiff insists that this power is conditioned both upon the power of Congress at the time of the unauthorized collection to lay the tax and upon an unequivocal manifestation of the legislative intent to ratify the unauthorized collection. It is urged that Section 611 evidences no such intent, that in any event, after the statutory bar has fallen, the taxpayer has a vested right to recover the taxes, and that to deprive him of this right constitutes a taking of property without due process of law.

In my judgment, an examination of the three pertinent sections of the Act of 1928 sufficiently indicates the intent to ratify the illegal collection and to prevent the return of taxes properly assessed, and, but for the limitation act, otherwise valid and due. Section 612 repeals as of its original date of enactment Section 1106 (a) of the Revenue Act of 1926 which specifically provided that the running of the statute should extinguish the right as well as bar the remedy. Section 607 (26 U. S. C. A. §2607) provides that in the ordinary case of payment after the statute has run, such payment shall be considered an overpayment and refunded or credited as such. Section 611 (26 U. S. C. A. § 2611) exempts from the operation of Section 607 cases, such as those at bar, in which a claim in abatement had been filed and collection delayed. While no express mention is made of ratification, a reading of these three sections in the light of their [fol. 43] purpose, as above stated, makes it abundantly clear that Congress intended to give to the collections already made (or to be made within a year) whatever validity it was empowered to give.

Contrary to Clinton Iron & Steel Co. v. Heiner (D. C.), 30 F. (2d) 542, relied on by plaintiff, I agree with the views expressed by Judge Dawson in Wright & Taylor, Inc., v. Lucas, supra, as follows:

"There is no merit in the plaintiff's suggestion that Section 611 is only an inhibition against the Commissioner of Internal Revenue making refunds in such cases, but that it has no application in a suit against a collector such as the

one here. Such a construction of this section would lead to an unconscionable result. When he collected the tax, the collector was required by law to immediately pay same into the Treasury. He had no right to retain the money pending the outcome of threatened litigation over the collection. The government has had the benefit of the collection. Yet, if the plaintiff's theory is correct, Congress intentionally left collectors open to suit and judgment in such cases as the one at bar * * *. It seems to me that the mere suggestion of the result of such a construction forces us to reject it."

To hold that the Commissioner is prohibited from making refunds, but that the collector may nevertheless be sued, would produce an anomalous situation, in view of the decisions that, though in form such suit is against the collector, in substance it is an action against the United States within the Tucker Act (24 Stat. 505). United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28; 32, 35 S. Ct. 499; 59 L. Ed. 825.

[fol. 44] [7] Plaintiff's final contention that, inasmuch as the statute had run at the time of the collection, Congress was then and is still without the constitutional power to remove the bar, cannot be sustained. It is well settled that there is no vested right to rely upon a statute of limitation to defeat a debt or other personal obligation; the Legislature which imposed the bar may remove it. Campbell v. Holt, 115 U. S. 620; 6 S. Ct. 209; 29 L. Ed. 483; cf. Decker v. Pouvailsmith Corp., N. Y. Ct. App., decided October 15, 1929, reported in 252 N. Y. 1; 168 N. E. 442. That because of sovereign grace the expiration of the statutory period not only gave the taxpayer a defense, but also a right to recover taxes paid thereafter, does not, in my judgment, change the result. Nor is this a case like Davis v. Mills, 194 U. S. 451; 24 S. Ct. 692; 48 L. Ed. 1067; or Danzer & Co. v. Gulf & S. I. R. R. Co., 268 U. S. 633; 45 S. Ct. 612; 69 L. Ed. 1126; in which the grant of a right is conditioned upon its being exercised within a prescribed period; for the right of the United States to these taxes existed prior to and independent of the grant of a limitation statute for the repose of the taxpayer. The result is identical with that reached by the Circuit Court of Appeals for the Ninth Circuit in Hunt-

ley v. Gile, 32 F. (2d) 857, and by Judge Dawson in Wright & Taylor, Inc. v. Lucas, supra, in both of which cases the constitutionality of Section 611 (26 U. S. C. A. §2611) was sustained.

No injustice to the taxpayer results from such construction. The purpose of the limitation statute was to protect the taxpayer against the assertion of stale governmental [fol. 45] claims at a time when most of the evidence bearing on the correctness of the assessment would have been lost. This purpose is certainly satisfied where, as here, the evidence relating to the assessment has been preserved in the claim for abatement.

[8] 4. The objection that Section 611 is unconstitutional, because it leaves to the collector the arbitrary power to determine whether or not to collect the tax and thereby prevent the taxpayer from recovering it, cannot be sustained. The section specifically covers payments (which includes collections) made within one year after its enactment. As held in Ellay Co. v. Bowers, supra, such collection cannot be enjoined, and, by virtue of Section 611, once the money has been collected, it may not be recovered solely because it was collected after the statutory period. That some taxpayers may escape because the collector does not act within the one-year period is beside the point; it must be assumed that the executive department of the government will act with due diligence.

Since the hearing on these motions for judgment on the pleadings, the precise question involved has been passed upon in this court in Laura H. Jennings v. Anderson, decided October 11, 1929. In that case Judge Grubb directed a verdict in favor of the plai-tiff taxpayer, but filed no opinion. While ordinarily the rule of comity would require me to follow Judge Grubb's decision, in view of the fact that he rendered no opinion in the case, and that he may perhaps have felt to some extent bound by the views of the Circuit [fol. 46] Court of Appeals of his home circuit (United States v. Burden, Smith & Co., supra), and in consideration, too, of the importance of the question presented, I have deemed it my duty, sitting in this Court, briefly to state my own views and conclusions.

Since the foregoing opinion was dictated, the opinion of the Ninth Circuit Court of Appeals in Goodcell (Millie

Francis Oil Company) v. Graham, 35 F. (2d) 586, filed November 4, 1929, has come to my attention. The foregoing opinion is entirely in accord with that opinion in the interpretation of the word "stay" and in declining to follow United States v. Burden, Smith & Co., supra.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME

To the Honorable William Bondy, Judge of the District Court of the United States for the Southern District of New York:

And now comes Daniel Reeves, Inc., the plaintiff in the above entitled cause, and feeling itself aggrieved by the judgment of the District Court of the United States for the Southern District of New York, entered on the 6th day of March, 1930, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Second Circuit, and prays that said appeal be allowed and shall act as a supersedeas upon filing good and sufficient surety as required by law. Assignment of errors is filed with this petition.

Daniel Reeves, Inc., by Herman Goldman, Attorney for Petitioner.

The foregoing appeal is hereby allowed upon filing of bond in the sum of $300.

Wm. Bondy, United States District Judge.

[fol. 48] *Duly sworn to by Herman Goldman. Jurat omitted in printing.*

[fol. 49] Citation, in usual form, omitted in printing.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Daniel Reeves, Inc., the plaintiff-in-error, and in connection with its petition for appeal says that in the record, proceedings, order, decision and judgment aforesaid, error has intervened to its prejudice, to wit:

1. The Court erred n refusing to enter judgment herein for the plaintiff-in-error in the sum of $2,061.31, with interest thereon from November 14th, 1925.

2. The Court erred in entering judgment for the defendant herein dismissing the complaint herein upon the merits and awarding the defendant costs in the sum of $30.

3. The Court erred in determinng as a conclusion of law that the delay of the defendant in the collection of the additional assessment or sum after the filing by the plaintiff of its claim in abatement constituted a stay of said collection.

[fol. 51] 4. The Court erred in determining as a conclusion of law that by reason of the enactment of Sections 607 and 611 of the Revenue Act of 1928 and by reason of the filing by the plaintiff of its claim for abatement, and by virtue of the delay by the defendant in making collection of said tax after the filing of the said claim for abatement, the plaintiff is precluded from recovering the amount collected by the defendant from the plaintiff on November 14th, 1925, or any part thereof or interest thereon, and in determining as a conclusion of law that the aforesaid facts enumerated in this assignment of error constitute a defense and a bar to the cause of action set forth in the complaint.

5. The Court erred in determining as a conclusion of law that Section 611 of the Revenue Act of 1928 is constitutional, and that the effect given to it as a defense and a bar against the cause of action alleged in the complaint does not result in a deprivation of the plaintiff of its property without due process of law in contravention of the

provisions of the Fifth Amendment to the Constitution of the United States.

6. The Court erred in determining as a conclusion of law that Section 611 of the Revenue Act of 1928 is constitutional and does not constitute a delegation to the several Collectors of Internal Revenue of the legislative power conferred upon Congress by Section 8 of Article I of the Constitution of the United States to lay and collect taxes, duties, imposts and excises.

7. The Court erred in determining as a conclusion of law that Section 611 of the Revenue Act of 1928 consti- [fol. 52] tutes a ratification by Congress of the collection by the defendant from the plaintiff of the additional sum or assessment made on November 14th, 1925.

8. The Court erred in determining as a conclusion of law that the provisions of the several Revenue Acts adopted by Congress prior to the year 1926, which provide the periods after the filing of reports of income and profits taxes within which a collection thereof or on account thereof might be made, were statutes of repose only and resulted only in the bar of the right of the Collector to make collections of taxes after the expiration of said period but did not extinguish the liability of the taxpayer to pay the tax.

9. The Court erred in determining as a conclusion of law that Section 1106 (a) of the Revenue Act of 1926, by reason of the repeal thereof as of the date of its enactment by Section 612 of the Revenue Act of 1928, did not operate to extinguish the liability of the plaintiff to pay said additional sum or assessment which was collected on November 14th, 1925.

10. The Court erred in determining as a conclusion of law that the affirmative defense alleged in the answer in this action states facts sufficient to constitute a good and complete defense to the cause of action alleged in the complaint and in determining that the facts contained in the stipulation of facts and found in the decision adequately support the allegations in said affirmative defense.

[fol. 53] 11. The Court erred in making the conclusion of law herein numbered Fifth.

12. The Court erred in making the conclusion of law herein numbered Sixth.

13. The Court erred in making the conclusion of law herein numbered Seventh.

14. The Court erred in making the conclusion of law herein numbered Eighth.

15. The Court erred in making the conclusion of law herein numbered Ninth.

16. The Court erred in making the conclusion of law herein numbered Tenth.

17. The Court erred in making the conclusion of law herein numbered Eleventh.

18. The Court erred in making the conclusion of law herein numbered Twelfth.

19. The Court erred in making the conclusion of law herein numbered Thirteenth.

Wherefore said plaintiff-in-error prays that said judgment of the District Court of the United States for the Southern District of New York may be set aside, reversed and held for naught.

Herman Goldman, Attorney for Petitioner. Office & P. O. address: 120 Broadway, Borough of Manhattan, City of New York.

[fol. 54] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter, as agreed upon by the parties.

Dated New York, April 3rd, 1930.

Herman Goldman, Attorney for Plaintiff. Charles H. Tuttle, U. S. Attorney, Attorney for Defendant.

[fol. 55] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 56] In United States Circuit Court of Appeals for the Second Circuit

Daniel Reeves, Inc., Appellant,

against

Charles W. Anderson, Individually and as Collector of Internal Revenue for the Third District of New York, Appellee

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeal by the plaintiff from a judgment of the District Court for the Southern District of New York dismissing a complaint in an action at law to recover income and profits taxes, paid under duress.

Elkan Turk for the appellant.
Walter H. Schulman for the appellee.

Opinion

L. Hand, Circuit Judge:

The taxpayer filed its return for 1919 on March 11, 1920, and during the year paid the taxes disclosed. The commissioner assessed a deficiency in March, 1924; the collector made demand for it on April 5, 1924; the taxpayer filed a claim for abatement on the sixteenth of that month. There matters rested without change until September 28, 1925, when the claim was rejected and on November 15, 1925, the [fol. 57] taxpayer paid the deficiency with interest under threat by the collector. After proper preliminary steps this suit was brought against the collector in November, 1927. The question is whether the delay in collecting the tax from March 11, 1920, the date of the return, to November 14, 1925, made the collector's act a tort on which a cause of action arose for money had and received.

In spite of the extraordinary differences in judicial opinion which the situation has evoked,—differences which only the Supreme Court can eventually settle,—the underlying facts are not complicated. Section 250 (d) of

the Revenue Act of 1918 set a limitation of five years after return upon the Commissioner's power to "determine and assess" the amount of the tax. The same section in the Act of 1921 reduced the period to four years, but kept it at five as to assessments under the Act of 1918. Until 1924 the Treasury had no longer period within which to collect taxes through the courts, then to assess them, so that if the Commissioner assessed the tax on the last day of the proper period, he could begin no "suit or proceeding in court" to collect it. He had not in practise paid much attention to this feature of the law because he supposed until February, 1927, that he had power for an indefinite time after assessment to distrain, and this was ordinarily remedy enough. The decision of the Supreme Court in Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346, which held [fol. 58] that distress was barred along with "suits and proceedings," disappointed this assurance and there was thereafter no way to collect, once the time to assess had expired. Sections 607 and 611 of the Act of 1928 were passed after this decision; the first made the assessment or payment of any tax after the period of limitation had expired an "overpayment" and gave the taxpayer a "credit or refund" for it, thus leaving matters as they had been, except to repeal section 1106 (a) of the Act of 1926. The second section excepted from the operation of the first all taxes assessed before the Act of 1924 went into effect, upon condition that the taxpayer had filed a claim for abatement which had stayed collection.

The distinction was a fair one. Section 278 (d) of the Act of 1924 had given the Treasury six years after assessment to collect, and while it took until January, 1929, finally to settle it that this applied only to assessments made after June 2, 1924, the effective date of the Act of 1924, (Russell v. U. S. 278 U. S. 181), that had apparently been already divined as a possibility. So it followed that while the Treasury had six years after assessment to collect taxes assessed after June 2, 1924, it had only four or five years from the return as to all assessed theretofore. Although the Commissioner had misconceived the law as to these, Congress made no effort to reclaim them by reimposition; the delay remained a final bar. Only in case the taxpayer had positively caused the Treasury's inaction by demanding a rehearing, was his advantage taken from him.

Congress refused to convert indulgence into immunity; certainly nothing could be more reasonable. We have only to determine whether the plan conceived in this spirit has miscarried.

[fol. 59] Specifically the arguments by which this exemption is sought to be secured are first, that collection was not "stayed" by the claim for abatement. If by this is meant that the claim raised no legal bar to collection, the argument is unanswerable; it did not. So far as we can discover no statute before 1924 gave such an effect to a claim for abatement except section 234 (a) (14) of the Act of 1918. This had to be filed with the return and not in response to an assessment, and was limited to inventory losses and rebates. Section 611 certainly did not refer to these. Section 279 of the Act of 1924 did indeed provide for a compulsory stay of collection, but only in the case of jeopardy assessments levied under section 274 (d) of that act. Aside from the limited scope of this section, it did not reach the only assessments touched by section 611, those levied before June 2, 1924. Thus, if we construe "stayed" to mean a legal bar, we should give the section no scope whatever. Patently it must refer to those cases in which the collector did not proceed with enforcement while the Commissioner was engaged in passing upon the claim for abatement; such a stay has in practise been recognized as ancillary to the Commissioner's power to remit, (Title 26, Sec. 149, U. S. Code). Had he insisted upon collection before disposing of the claim, the taxpayer would with some justice have been vocal in protest. It is ungenerous now to complain that he did not do so.

[fol. 60] Next, the plaintiff says that if "stayed" means a voluntary stay, the record must show that the claim was the cause of it, and does not. The assessment was collectible as soon as made; no effort was in fact made to collect it till the claim was disposed of; the sequence of the two suggests a causal relation between them. Moreover, to suppose that the collector meanwhile withheld action for any other reason than because his collection might turn out to be unwarranted, is to assume that he was slack in his duty; we are entitled to assume the opposite. Article 1032 of Regulations 45 puts collection in his discretion in such circumstances; his inaction would have been without excuse except for the claim. Regardless of the eventual burden

of proof on the issue, the presumption is that the delay was caused by the claim; and there was no proof to meet it.

The next point demands more attention. The argument runs as follows. Section 607 provides that a tax assessed or paid after the period had expired should be "credited or refunded." Section 611 is merely an exception from this provision; it does not give any right to the Treasury to hold money which it had no right to hold before. Section 607 was passed to be rid of the effect of Section 1106 (a) of the Act of 1926, which had provided that although the expiration of the period of limitation of a tax extinguished the debt, the Commissioner should not credit or refund it unless it was not in fact due when the taxpayer paid it. This section we held not to prevent an action for money had, (Ellay Co. v. Bowers, 25 Fed. (2) 637); it follows that at [fol. 61] that time the taxpayer could have got a "refund" by action, though he could not from the Commissioner. All that section 607 has done is to restore the administrative remedy which section 1106 (a) took away, leaving the taxpayer in possession of all remedies, except against the Commissioner, (§ 611), in cases where he had induced the delay. Since, however, the remedy of an action at law existed all along, and since it did not therefore need any assistance from section 607, section 611 is irrelevant. It was not intended as an affirmative limitation upon preexisting remedies.

This argument is not dependent alone upon the word "refund" in section 607; it has a broader historical basis, and it must be confessed that it is plausible. We think it impossible however so to read section 611 for several reasons. Section 3226 of the Revised Statutes as amended in 1926, (Sec. 1113), requires the filing of a claim for refund or credit as a condition precedent to suit against the collector. It certainly would be an unusual thing to require as a condition precedent an application which by hypothesis could not be granted. But even if we assume that Congress might have wished still to impose the abortive claim for abatement as a condition on the action, the consequences are absurd. Nobody has a claim for refund who has not a possible right of action. The time for presenting the claim is three or four years (Title 26, Sec. 1065), and the time within which to sue is five, (R. S. § 3226), so that the time to file the claim expires first. The effect of section 611, which forbad

[fol. 62] such claims, would only be that taxpayers should not get that cash from the Commissioner which they still could get by way of judgment. It is difficult to conjure any reason which Congress could have had for forbidding the more commodious way of settling such controversies, and still exposing the Treasury to actions at law which must result in exactly the same thing. It would take the strongest possible language to force us to such a conclusion.

The language of section 607 does not go far enough. It makes the taxes described an "overpayment"; that alone was enough to create a cause of action at law, though it was not necessary, as things stood. The second clause in the sentence changed the situation formerly created by section 1106 (a) of the Act of 1926, the effect of which had been to drive the taxpayer to suit. Section 611 enacted that the excepted assessments and payments should "not be considered as an over-payment", and in so doing positively struck the foundation from under any recovery by action, by credit or by refund; it was more than an exception to the second clause of section 607; it dealt with the merits of the recovery as well as with the remedies available.

This disposes of the only questions that seem to us important, for we cannot so regard the argument against the validity of the statute, though it is very earnestly presented. Taxpayers in the plaintiff's position do indeed lose an immunity once acquired; they lose it,—we will assume argu- [fol. 63] endo,—by the mere fiat of the statute; Congress has seen fit in effect to impose the tax upon them de novo at a time long after the events took place on which it depends. This is charged to be in violation of the Fifth Amendment, and so it might be, if there had been no original tax, no claim for abatement, no delay of the Treasury in the disposal of that claim, and a consequent loss of all remedies. Were the Fifth Amendment a remorseless pattern which all legislation must fit, the argument might even so be troublesome; might indeed be conclusive. But constitutional limitations are not indifferent to the occasions of the statutes they affect. They represent a mood rather than a command, that sense of moderation, of fair play, of mutual forbearance, without which states become the prey of faction. They are not the rules of a game; their meaning is lost when they are treated as though they were. It is quite true that the section took away a defense from the

plaintiff; he is right to complain unless we can question the kind of defense it was. The moment we do, it must appear to any fair person that he ought not to have it. What the Treasury lost through its procrastination, it lost forever, even though it was under an honest mistake as to its remedies. If the taxpayer did nothing to provoke or encourage its delay, perhaps it was fair that his liabilities once dead should not be revived; there is a deep instinct behind any statute of limitations. But if he asked for recon- [fol. 64] sideration because he had been unlawfully treated, and if his complaint was entertained, then by virtue of an equally deep instinct, it is unfair to allow him to treat that conduct as a fault which he was the means of procuring. He ought not in short to be able to avoid his share of the public burdens, because the authorities consented to give him a considerate hearing. It does not help to call the bar of the statute a vested right; that is at best a figure of speech, which does now hallow everything that is past, a default in pleading as well as a homestead. One's grip on an antagonist, enmeshed in a net of statutes, may be a vested right, but it is not a constitutional right The Supreme Court went much further in United States v. Heinszel, 206 U. S. 370, and Rafferty v. Smith, 247 U. S. 226.

Nor does it make any difference that the Senate struck out the House provision for the future collection of such assessments within a year. The argument is that the tax is not uniform under section eight of Article one of the Constitution, and also apparently that it is discriminatory. As to the second, we can see no reason why Congress should not draw the line between what had been closed and what had not. If the Treasury had for four years or more failed to collect, that might be thought time enough even though the taxpayer had been the cause of the delay; there comes a time to end all things. The whole notion of a limitation involves some discrimination, which in actual incidence must appear, and indeed be, arbitrary. As for section eight [fols. 65 & 66] of Article one it has repeatedly been held to require only territorial uniformity, (The Head Money Cases, 112 U. S. 580, 595; La Belle Iron Works v. U. S., 256 U. S. 377, 392.

We have quite deliberately avoided the citation of those decisions which have hitherto dealt with these questions. Those in the district court are so many and so conflicting

that it would serve no purpose merely to enumerate them. In the Circuit Courts of Appeal at present the plaintiff would win in the Fifth, (U. S. v. Burden, Smith & Co., 33 Fed. (2) 229), and lose in the Ninth, (Huntley v. Gile & Jenks, 32 Fed. (2) 857; Goodcell v. Graham & Foster, 35 Fed. (2) 586). Apparently he would also lose in the Court of Claims, though we have not been favored with the citation in an available form, Gotham Can Co. v. U. S.). So far as the courts have gone, there is therefore a preponderance of authority in favor of the decision below.

Judgment affirmed.

[fol. 67] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

DANIEL REEVES, INC., Plaintiff-Appellant,

v.

CHARLES W. ANDERSON, as Collector, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Filed July 28, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is advanced and assigned for hearing immediately following case No. 337, Boston Pressed Metal Company vs. The United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.